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POWERS IN TRUST AND GIFTS IMPLIED IN DEFAULT OF APPOINTMENT.

POWERS in trust or in the nature of trust are often spoken of in the books.

In a sense, all special or limited powers are fiduciary. They cannot be exercised for the benefit of the donee of the power or of any other person not an object of the power. But this is not what is meant by a "power in trust." A power in trust or in the nature of trust is a power which imposes upon the donee a duty to exercise it, enforceable in equity.

Though "power in trust" is a common, it is not, I venture to think, an exact expression. Two separate things are confounded under it.

A power is an authority to deal with property apart from ownership. It is generally an authority to deal with property owned by some person other than the donee of the power; but a man may be given a power to deal with property which he himself owns. Such a power is called a power appendant.

A power appendant is always destructible by the donee. A man cannot be deprived of the right to deal as owner with property which he owns by giving him a power; and by conveying the property as owner, he is estopped to exercise the power.

When property is given to a man with the provision that he shall have a power to appoint it in a certain way, if this provision creates a trust, the trust is imposed upon him as owner of an estate or interest, and not upon him as donee of a power. If it were im-

posed upon him as donee of the power, since the power is appendant, and all powers appendant are destructible, the trust attached to it would be destructible also.

The man holds his estate or interest subject directly to the trust, and equity does not allow him to deal with his estate or interest in a manner inconsistent with the trust; and this is the result whatever words are used to create the trust; whether the word "power" is used or not. In a case of this kind there may be said to be a power in trust or in the nature of a trust; but the better expression would be that there is a trust in the form of a power.

It makes no difference whether the estate or interest which the man holds is legal or equitable.

The question which arises in this class of cases is whether a provision is simply advice, or whether a trust is created,—the question of precatory trust. This question does not concern us here; if a trust is created, it attaches itself directly to the estate or interest, though it be put in the form of a power.

But there is another class of cases.

A power may be given to a man, the exercise of which does not derogate from his own estate or interest,—that is, which is not a power appendant, but which derogates from the estate or interest of some other person or persons. The donee may have an estate or interest in the property, as when property is given to A. for life, with a power to him to appoint the remainder; this is called a power in gross or collateral. Or the donee may have no estate or interest in the property, as when property is given to A. for life, with a power to B. to appoint the remainder; this is called a power simply collateral.

Is such a power ever a power in trust?

A system of law is conceivable in which equity would compel a donee to exercise such a power or would exercise it for him. In such a system a power of this kind might be properly called a power in trust.

But such is not the system of our law.

When our law thinks that the objects of a power ought to have an estate or interest in the property, although no appointment has been made, it does not compel the donee to exercise the power, nor does it exercise it for him, but it declares that there is an implied gift to the objects of the power in default of appointment.

Sometimes the implied gift is of a legal, sometimes of an equitable estate or interest. Thus, if a legal life estate is given to A., with a power of appointment, the gift implied in default of appointment will be of a legal estate. On the other hand, if an estate is given to trustees, and a power is given to A. to appoint, the gift implied in default of appointment will be of an equitable estate only; but this is not because the power itself is in trust, but because the subject of the power is only an equitable interest. In cases of this second kind, if A. is both owner of the legal estate as trustee, and also donee of the power, there is in default of appointment undoubtedly a trust on his legal estate for the objects of the power, and therefore it is fair enough to say that A. has a power in trust, because a trust is fastened on his estate by reason of the existence of the power. This was what occurred in the earlier cases in which the expression "power in trust" was used. Such was the case of Brown *v.* Higgs,[1] a leading authority, but one which has been a chief cause of confusion on this topic.

That, in cases of the second class, whenever property, in default of appointment, passes to the objects of a power, it passes by implied gift, and not by an exercise of the power, appears from several considerations:

First. Equity never compels a donee to exercise a power of appointment; what it does is to act when he has not executed it.

Second. When a legal estate is given to A. for life, and a power is given to A. or to B. to appoint the remainder, if the objects of the power take in default of appointment, they must take by an implied gift; equity has nothing to do with it.[2]

Third. The case of Bull *v.* Vardy [3] is conclusive to the point that equity does not exercise a power, when there is a failure to appoint. A testator devised certain real estate to his wife, but gave her no other interest in his property. He then went on: "I further empower my wife to give away at her death 1000 *l.*; 100 *l.* of it to T.; 100 *l.* to B.; the other 800 *l.* to be disposed of by her by her will." He made several legacies, and gave the residue to two women named

[1] 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803).

[2] See Morgan d. Surman *v.* Surman, 1 Taunt. 289 (1808); Halfhead *v.* Sheppard, 1 E. & E. 918 (1859); Tomlinson *v.* Nickell, 24 W. Va. 148 (1884); McGaughey's Admr. *v.* Henry, 15 B. Mon. (Ky.) 383 (1854); Rogers *v.* Rogers, 2 Head (Tenn.) 660 (1859).

[3] 1 Ves. Jr. 270 (1791).

C. The wife died without making any disposition of the 1000 *l.* T. brought a bill against the wife's executor claiming the 100 *l.* The bill was dismissed. The court said that where the absolute interest is given to one with any expression that the devisee shall dispose of the whole or a part to a particular person, there a trust is raised for that person which the court will execute. But that here the wife had no interest in the 100 *l.* so there was nothing to raise a trust. That is, the court held that this was not a case of the first class above mentioned. The court then considered whether the testator was to be regarded as having made a direct gift to T. They seem to have thought that T. could not take by way of either direct or implied gift from the testator; but whether they were right or wrong in this, they were clearly right in dismissing the bill, for if there was either a direct or an implied gift to T., the bill should have been brought against the testator's executor and residuary legatees, and not, as it was, against the executor of the donee of the power. If the court was attending to the execution of the power, then the executor of the donee was the proper person against whom to bring the bill, but the court says: "It was not argued, that if it was the case of a power, the court could do anything to execute it." That is, that if the objects of a power in gross or simply collateral take upon default of appointment, they take under a direct or implied gift under the will of the original testator, and not by an exercise of the power.

Fourth. If equity really exercised an exclusive discretionary power, it would exercise the full power, discretion and all. This it never does. The estate or interest which is to arise in default of appointment is determined by fixed rules into which no element of discretion enters.

At the end of the seventeenth century, the court sometimes exercised discretion.[4] But, as Lord St. Leonards says:[5] "These cases are not now law. . . . Such a power is now disclaimed. The Court never exercises a discretionary power."[6]

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[4] Carr *v.* Bedford, 2 Rep. in Ch. 146 (1715). *Cf.* Moseley *v.* Moseley, Finch 53 (1673); Clark *v.* Turner, 2 Freem. 198 (1694) (and see Baker *v.* Barrett, there cited); Warburton *v.* Warburton, 2 Vern. 420 (1701), affirmed *Dom. Proc.*, 4 Bro. P. C., Toml. ed., 1; and see Attorney-General *v.* Bradley, 1 Eden 482 (1760).

[5] Sugden, Powers, 8 ed., 601.

[6] See Doyley *v.* Attorney-General, 4 Vin. Abr. 485, *pl.* 16 (1735); Cruwys *v.* Colman, 9 Ves. 319 (1804); Robinson *v.* Smith, 6 Madd. 194 (1821); Salusbury *v.*

It may be said, and it seems as if it must be said, by those who contend that the court is exercising the power, that the rule for giving the property to all the members of the class is not a refusal to exercise the full discretionary power, but is merely in accordance with a rule of convenience for equal division. It is hard to say this in the face of Lord St. Leonards' statement above given.

But there are cases for which this explanation will not suffice.

In Brown *v.* Higgs [7] there was a power to appoint to one of a class. No appointment. The case was not ripe for decision, but Lord Alvanley, M. R., said that the inclination of his opinion was that it was a mere power. This is approved by Lord St. Leonards [8] and by Mr. Leake.[9]

In Little *v.* Neil [10] a testator gave a power in favor of one or more of the wife and issue of P., but declared that any provision for the wife should be by an annuity depending on the life of P. The donee declined to make an appointment. Kindersley, V. C., said that the only difficulty he felt was whether, in giving the wife a share in the fund, he ought not to give effect to the direction that she should have only an annuity. He went on:

"But under the present circumstances the court is not exercising the discretion of the trustees nor continuing the settlement; and therefore I cannot do otherwise than direct the fund to be divided equally among the children and grandchildren." [11]

Fifth. If equity really exercised the power when the donee failed to exercise it, there is no reason why it should not aid the non-execution of a power in a case where it would aid a defective execution. But "it is an immutable rule that a non-execution shall never be aided." [12]

It cannot be denied that in many of the cases, especially the earlier ones, the objects of a power are said to take because the power is in trust, but the distinction between the exercise of a power and an implied gift does not appear to have been in the minds of the courts. Even down to recent times we find a trust

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Denton, 3 Kay & J. 529 (1857); McGaughey's Admr. *v.* Henry, 15 B. Mon. (Ky.) 383 (1854).

[7] 4 Ves. 708, 719 (1799).

[8] Sugden, Powers, 8 ed., 593.

[9] Land Law, 391.

[10] 31 L. J. Ch. 627 (1862).

[11] See the opinion in this case in full, pp. 29, 30, *post.*

[12] Sugden, Powers, 8 ed., 588.

coupled with a power and a gift by implication spoken of as if they were the same thing.[13]

It was the acute mind of Lord St. Leonards which first perceived that when the objects of a power take upon failure to appoint, they take by an implied gift. In the first edition of his book on Powers, published in 1808, he said:[14]

"In Brown *v.* Higgs, 8 Ves. 574, Lord Eldon stated the principle of all the cases on this subject to be, that if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power."

The important words here are "who has given him an interest extensive enough to enable him to discharge it," and that Lord St. Leonards thought so is shown by the fact that in later editions of the book these words are printed in italics.

In Brown *v.* Higgs, B., a trustee, had the absolute legal estate, and also the beneficial interest for life and a power to appoint the equitable estate subject to his life interest. He made no appointment. It was held that the objects of the power took. Now here I conceive the more exact expression is to say there was an implied gift of the equitable estate to the objects of the power; but as B. had the whole legal estate, there was undoubtedly a trust on that estate for the objects of the power, and therefore it was fair enough to say that there was a power in trust, because the donee of the power was also the owner of the legal estate, and a trust was fastened directly on that estate by reason of the existence of the power.

Lord St. Leonards then went on to consider the cases where the donee of the power has not the whole legal estate. He says:[15]

"There is a class of cases where the bequest is considered not as a power in the nature of a trust, but as a power with a bequest over to the object of it in default of appointment, by *implication*. [The italics are his.] In many instances it is difficult to distinguish the cases.

"Thus in Mason *v.* Limbery, T. Term, 1734, MS. a bequest to A.

[13] Carberry *v.* M'Carthy, 7 L. R. Ir. 328, 333 (1881). Was it not an undue reliance by Mr. Ames on the expression "power in trust" which is responsible for his assault on Morice *v.* Bishop of Durham, 5 HARV. L. REV. 389?

[14] See p. 317.

[15] See p. 320.

for life whom the testator 'desired at his death to give it amongst his children, and the children of his said daughter, as he should think fit,' was held by Lord Talbot to be a devise to the children in default of appointment, and the children were accordingly decreed to be entitled to the fund, although A. died in the lifetime of the testator, and there are other cases to the same effect."

That is all that Lord St. Leonards says about this class of cases in his first edition, but in the sixth edition, published in 1836, and in the subsequent editions, he enlarges upon the subject and discusses four classes of cases: (1) where the objects of the power do not take; (2) where there is a power in trust within Brown *v.* Higgs; (3) when they take by implied gift; (4) where there is held, on the true construction of the will, to be an express gift to the objects of the power in default of appointment. He says:[16] "This doctrine of gift by implication has not been established without a struggle."

The first case in which I have observed a statement in the reports that objects of a power, upon failure to appoint, take by implication, is Kennedy *v.* Kingston.[17]

In Lambert *v.* Thwaites[18] it was held that there was an express gift to the objects of the power, but the doctrine of gift by implication was fully recognized.[19]

The best statement of the law is to be found in Moore *v.* Ffolliot:[20]

"There are several classes of cases . . . First, an estate of inheritance with power of appointment. If the language used in the execution [*qu.* creation] of the power amounts to a precatory trust, the trust will fasten itself on the inheritance; the donee of the power will be bound to execute it, and if he fail to do so the Court will carry it into effect as if he had. This is the case of Brown *v.* Higgs and the like. In Brown *v.* Higgs stress is laid on the circumstance that the testator had given the donee of the power 'an interest extensive enough to enable him to discharge it.'

"There is, however, a distinct class of cases where the donee of the power does not take more than a life estate. In these, however clear the expression of desire on the part of the donor in favor of a particular

[16] 8 ed., p. 591.

[17] 2 Jac. & W. 431, 434 (1821). S. P. Brown *v.* Pocock, 6 Sim. 257 (1833). See *Re* White's Trusts, H. R. V. Johns. 656 (1860); Stolworthy *v.* Sancroft, 33 L. J. Ch. 708 (1864).

[18] L. R. 2 Eq. 151 (1866).

[19] See Farwell, Powers, 2 ed., 472, 474; Leake, Land Law, 391, 392.

[20] 19 L. R. Ir. 499, 501, 502 (1887).

person or class of persons may be, yet, as the donee has no estate, or none beyond his life, the trust to exercise the power is as such personal, and does not directly attach upon the inheritance, save in so far as the Court finds in the language an implication in favor of the objects in default of appointment. In this case, if they take the estate, they take it by implication, and thus by way of limitation under the instrument creating the power. In the former class of cases the Court acts by executing the power in lieu of the donee; in the latter by simply giving effect to the estate implied in the words of the deed or will."

I shall confine myself to the consideration of the second class of cases, the cases where a real power is given, and not where a trust is directly attached to property.

I. When a special power in gross or simply collateral to appoint to a class is given, and there is no gift over in default of appointment, and no appointment is made, the objects of the power take by implication the estate or interest that might have been appointed to them.[21]

In Marlborough *v.* Godolphin [22] a life interest in a fund was given to A.; after A.'s death the fund to be divided and distributed to such of the testator's children as A. should by deed or will appoint. It was held that no gift to the children in default of appointment was implied. But this case, although an elaborate opinion of Lord Hardwicke, has been much criticized.[23] It would not now be followed.

In Crossling *v.* Crossling [24] land was devised to A. for life, "and she shall dispose of the same amongst my children at her decease as she shall think proper." It was held by the Court of Exchequer that there was no gift over in default of appointment. This case has been doubted, and justly, by Sugden [25] and Farwell.[26]

In Down *v.* Worrall [27] a testator directed his trustees to settle such part of the residue at their discretion either for charitable

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[21] Sugden, Powers, 8 ed., 591; Farwell, Powers, 2 ed., 466; 1 Jarman, Wills, 6 ed., 650; Leake, Land Law, 391; 1 Tiffany, Real Property, § 290.

[22] 1 Ves. Sr. 61 (1750).

[23] Brown *v.* Higgs, 5 Ves. 495, 505 (1800); Salusbury *v.* Denton, 3 Kay & J. 529, 535 (1857); Pocock *v.* Attorney-General, 3 Ch. D. 342, 348 (1876); Wilson *v.* Duguid, 24 Ch. D. 244, 250 (1881); Sugden, Powers, 8 ed., 592; Farwell, Powers, 2 ed., 464; 1 Jarman, Wills, 6 ed., 651, note.

[24] 2 Cox 396 (1794).

[25] Powers, 8 ed., 592.

[26] Powers, 2 ed., 464.

[27] 1 Myl. & K. 561 (1833).

purposes or otherwise for the benefit of the testator's sister and her children. The trustees had all died. Sir John Leach, M. R., held that the power was personal, and that what remained unappointed at the death of the surviving trustee belonged to the testator's next of kin, as undisposed of. The opinion is very short:

"Where a disposition is made in favor of charity and the trustee fails, the Court will interfere and execute the trust; but here no disposition is made in favor of charity as to the unappointed part. The trustees had a personal discretion as to the application of the fund, and, as they have died without exercising that discretion, this part of the property is undisposed of by the testator and belongs to the next of kin."

Down *v.* Worrall is not cited by Lord St. Leonards, and Mr. Farwell [28] speaks of it as "a very doubtful case," and in Salusbury *v.* Denton,[29] where a donee had a power to appoint to a charity, and the remainder to the testator's relatives as the donee might choose, and the donee made no appointment, the court gave half the fund in charity and the other half to the relatives. No such solution was suggested in Down *v.* Worrall. It is submitted that Down *v.* Worrall is wrong.

In Bull *v.* Vardy [30] the point decided was that the objects of a power do not take, in default of appointment, by virtue of an exercise of the power by the court, but the court seem to have thought that under the circumstances of that case they did not take either by way of direct gift or implied gift under the will of the original testator. The case, though cited by Sugden, is not commented on by him, and is not even cited by Farwell.[31]

II. There is no gift implied after a general power. A general power is a power to appoint to all the world, and all the world cannot be made the object of an implied gift.

III. A gift in default of appointment is implied, although the power is an exclusive one, that is, a power to select and not to distribute.[32]

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[28] Powers, 2 ed., 471.

[29] 3 Kay & J. 529 (1857).

[30] 1 Ves. Jr. 270 (1791), stated p. 3, *ante.*

[31] See *In re* Brierley, 43 W. R. 36, stated p. 12, *post.*

[32] Witts *v.* Boddington, 3 Bro. Ch., Belt's ed., 94 (1790); Brown *v.* Higgs, 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803); Burrough *v.* Philcox, 5 Myl. & C. 72 (1840).

IV. If there is an express gift in default of appointment, no gift can be implied.[33]

But the fact that there is an express gift in default of appointment upon a contingency which has not in fact occurred does not exclude an implied gift. Thus, where there was a power in A. to appoint to the children of a marriage, and if there were no issue of the marriage, a general power in A. to appoint, and a gift over in default of appointment, and there were children, and the power was not exercised, there was a gift implied to the children.[34]

V. Although there may be no express gift over, the existence of an implied gift may be negatived by the provisions of a will. Thus in Carberry *v.* M'Carthy[35] a testator, after declaring in the will that he had already provided for his children, and that he did not "hereby make any further provision for them," gave certain property to his wife upon trust to receive the income during her life, with full power to dispose thereof by deed or will to any of his children. Chatterton, V. C., said that there would have been a gift over by implication to the children in default of appointment, had it not been for the declaration by the testator that he had already provided for the children, but that this declaration showed that the testator intended that the children should not take except by an execution of the power; and that, therefore, the implied gift to them which would have otherwise existed was excluded.

VI. Where there is an express gift in default of appointment, although it is void for remoteness, any implied gift is excluded.[36]

VII. In Brown *v.* Higgs[37] there was a devise to J. in tail, and in default of issue, to one of the sons of S., as J. should, by deed or will, direct. J. and S. both died in the testator's lifetime. S. had four sons. They brought a bill praying that the will might be established. The case was not ripe for decision, and Lord Alvanley,

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[33] Roddy *v.* Fitzgerald, 6 H. L. C. 823, 856 (1857); Pattison *v.* Pattison, 19 Beav. 638 (1854); Goldring *v.* Inwood, 3 Giff. 139 (1861); Richardson *v.* Harrison, 16 Q. B. D. 85, 102, 103, 104 (1885), commenting on *In re* Jeffery's Trusts, L. R. 14 Eq. 136 (1872); *In re* Lyons and Carroll's Contract, [1896] 1 I. R. 383.

[34] Fenwick *v.* Greenwell, 10 Beav. 412 (1847). And see Bradley *v.* Cartwright, 16 Q. B. D. 511; Doe *v.* Goldsmith, 7 Taunt. 209 (1816). *Cf.* Butler *v.* Gray, L. R. 5 Ch. 26 (1869).

[35] 7 L. R. Ir. 328 (1881).

[36] *Re* Sprague, 43 L. T. R. 236 (1880).

[37] 4 Ves. 708 (1799).

M. R., made no decision, but he said [38] that he was inclined against the plaintiffs. This inclination seems correct. Only one son was the object of the power, and it was impossible to say to which one a gift could be implied. [39]

VIII. Is the gift of the residue a gift over in default of appointment, which excludes any gift by implication?

In Forbes *v.* Ball [40] a testator gave his wife 500 *l.*, and added: "That it was his will and desire" that she should dispose of it amongst her relations as she by will might think proper. The residue was given to her for life, with gifts over. Sir William Grant, M. R., held that the power had been well exercised, but he said that the will raised a trust for the wife's relations, subject to her appointment.

Healy *v.* Donnery [41] was ejectment by the heir of M. for failure to pay rent under a lease for 100 years made by M. to the defendant. The defendant contended that M. had only a life estate, and therefore the lease was determined. The decision of the question turned upon the construction of the will of M.'s father, who died seised of the premises, and devised the premises to M. upon trust to receive the rents during her life, with power to her, by deed or will, to dispose of or devise the premises among her children in such shares as she should see fit. He gave the residue of his estate to M. M. did not execute the power. The court held that M. took the absolute legal estate, and therefore her heir could maintain this ejectment. As M. took the whole legal estate, even if there had been an implied gift, it would have been only of an equitable estate, and M.'s heir was the proper person to bring the ejectment. As the counsel for the defendant said: [42] "The only question in the case is whether the children take the legal or only an equitable estate." This case, therefore, does not determine whether, when a life estate is given to A. and a power to him to appoint, a residuary devise to him is a gift in default of appointment so as to exclude an implied gift. [43]

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[38] 4 Ves. 719.

[39] See Sinnott *v.* Walsh, 5 L. R. Ir. 27 (1880); Sugden, Powers, 8 ed., 593; 1 Jarman, Wills, 6 ed., 653.

[40] 3 Meriv. 437 (1817). [41] 3 Ir. C. L. 213 (1853). [42] See p. 215.

[43] The statement in Ahearne *v.* Aherne, 9 L. R. Ir. 144, 148 (1881), that in Healy *v.* Donnery it was not held that M. took the absolute legal interest seems unjustifiable, in face of the positive statement in that case of Greene, B., that she did.

But in Salusbury *v.* Denton,[44] where property was given to the testator's wife for life, with a power to her to appoint, and the wife was made residuary legatee, and the power was not exercised, the court held that there was an implied gift to the objects of the power. It is rather singular that the point of there being a residuary gift to the wife is not mentioned in the opinion.[45]

In *In re* Brierley[46] a fund was given to trustees in trust to pay the income to the testator's wife for life, with a power to her to appoint the fund to "such of my relatives or next of kin as she may think proper." The wife was made residuary legatee. There was a question whether, on the construction of the will, there was a gift over, in default of appointment, to persons other than the wife, or whether there was a gift of the fund by implication to the testator's next of kin. The court decided that one of these alternatives was correct. They expressly abstained from deciding which, but they held that *upon neither alternative* was the wife as residuary legatee entitled if the power was not exercised. Davey, L. J., said: "A residuary gift is not the same thing as a gift in default of appointment; a residuary gift only gives what would otherwise go to the next of kin." In deciding that a gift of the residue is not a gift over in default of appointment, the court refer to Forbes *v.* Ball[47] and Salusbury *v.* Denton.[48]

It can therefore be said that a gift of the residue is not such a gift in default of appointment as to exclude a gift by implication.

IX. When there is a power to appoint to a class, and no gift over in default of appointment, and the power is not exercised, there is an implied gift to the members of the class, but it has often been remarked that the language of the will or other instrument creating the power may amount to a direct gift to the members of the class. Thus, if there is a gift to A. for life, with a power to him to appoint to his children, and A. does not exercise the power,

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[44] 3 Kay & J. 529 (1857).

[45] In the report of the argument of the counsel for the wife's administrator (pp. 531, 532), it is said that the residuary legacy was to the "testator's relatives now represented" by the wife's administrator. This is a slip of the reporter's; the residuary legacy was to the wife, and the counsel's client was her administrator.

[46] 43 W. R. 36 (Court of Appeal). (1894).

[47] 3 Meriv. 437 (1817).

[48] 3 Kay & J. 529 (1857). The case of *In re* Brierley will be referred to later in another connection.

there is a gift by implication to the children; while if there is a gift to A. for life, and on his death to his children in such proportions as A. shall appoint, there is considered to be a direct gift to the children, subject to the power. In the former case, the children take by implication; in the latter, by direct gift.[49] But there is a recent case which holds that it is only in the latter class of cases that the children can take, that is, that they take only by direct gift, that practically there is never any gift to them by implication.

The proposition is a startling one, and the case must be considered carefully.

It is *In re* Weekes' Settlement.[50] By a marriage settlement land was settled to uses in favor of the intended wife for life, and on her death, as she should by will appoint, and in default of appointment, to B. By another settlement of even date, personal property was settled in favor of the husband and wife for their lives, and on the death of the survivor, as the survivor should by deed or will appoint, and in default of appointment, to the children of the marriage. The wife died, and by her will gave to the husband a life interest in the land, and also gave him a power to dispose of the land and other property by will amongst the children "in accordance with the power granted to him as regards the other property which I have under my marriage settlements." There were children of the marriage. The husband died without exercising the power. The question was whether B. or the children were entitled to the land. Romer, J., held that B. was entitled.

If the general power given to the wife was not exercised, there was an express gift over in default of appointment to B.; and it may be, perhaps, the law that if a general power is exercised by giving a special power to appoint to a class, the implied gift over to the objects of the special power which would ordinarily be raised is displaced by the express gift in default of appointment under the general power. Whether such displacement would take place seems doubtful, and although Romer, J., refers to the fact that there was an express gift to B., on default of appointment under the general power,[51] he does not rest his decision on this, but discusses the general question whether, upon a special power to appoint to

[49] Sugden, Powers, 8 ed., 591, 597; Farwell, Powers, 2 ed., 472, 474; Leake, Land Law, 391.

[50] [1897] 1 Ch. 289.

[51] See p. 293.

a class, there is an implied gift over to the objects of the power; and he decides that there is no such implied gift, but that the objects of the power take in default of appointment only when an express gift to them, or the creation of a trust for them, in default of appointment, can be extracted from the language used by the settlor or testator. He says:

"You must find in the will an indication in fact that the power should be regarded in the nature of a trust — only a power of selection being given, as, for example, a gift to A. for life, with a gift over to such of a class as A. shall appoint."

The only case cited by the learned judge in support of his position is the Irish case of Healy *v.* Donnery.[52] Romer, J., says that in that case there was a life estate with a power to appoint, but, with submission, that is not so. What the Irish Court of Exchequer held was that the whole legal interest was in the plaintiff, and that, therefore, he could maintain a suit for ejectment against a tenant for years who had failed to pay his rent.

The learned judge then goes on to refer to nine cases in which there was held to be a gift over to the objects of an unexercised power, and he attempts to distinguish them on the ground that in them there was a direct gift to the objects of the power, subject to a power of distribution, and that they took by virtue of the direct gift, and not by implication.

(1) In Brown *v.* Higgs[53] the testator "authorized and empowered" J. to receive certain rent and to dispose of it, 100 *l.* annually to himself and to employ the remainder to such children of the testator's nephew S. as J. should think most deserving and would make the best use of it, or to the children of the testator's nephew W. J. did not exercise the power. It was held that the children of S. and W. took. Romer, J., quotes passages from the opinions of Lord Alvanley, M. R., and Lord Eldon, C., but these learned judges speak of the question being whether the power was a simple power or a power in trust, and there is nothing to show whether the trust was to be effected by an implied gift or an express gift. The doctrine that the taking in default of appointment must be either by an express or implied gift was not then clearly apprehended.

[52] 3 Ir. C. L. 213 (1853). The case is stated p. 11, *ante*.

[53] 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1801).

(2) In Burrough *v.* Philcox[54] a will directed that on certain contingencies the testator's property should "be disposed of as shall be herein after mentioned, (that is to say)" A. should have power by will to dispose of the property to one or more of the testator's nephews and nieces and their children as A. should think proper. The power was not exercised. Lord Cottenham, C., held that the nephews and nieces and their children took in default of appointment. He said:

"When there appears a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class."

But whether the intention is carried into effect by considering that there is an implied gift or that there is an express gift, the Chancellor does not say.

(3) In Witts *v.* Boddington[55] a testator gave to his wife during her life the enjoyment of his watches, rings, jewels and plate and all his diamonds, etc., with an exclusive power for her, by deed or will, to give the same to the children of M., who was his only daughter, but if no such children were alive at his wife's death, then he desired her to give or leave the same to some one or more of his own relations. The wife did not exercise the power as to some of the articles. It was held that the children of the daughter took. Romer, J., disposes of this case by saying that the will was "very peculiar."

(4) In Forbes *v.* Ball[56] a will said: "I give to A. C. 500 *l.*, and it is my will and desire that A. C. may dispose of the same among her relations, as she by her will may think proper." Sir William Grant, M. R., said that there was a gift to the wife's relations. Romer, J.'s comment on this case is that such gift over was by force of the words "my will and desire."

(5) In Birch *v.* Wade[57] the same words "will and desire" were used, and Romer, J., again says that it was by force of these words that there was a gift in default of appointment. But as to this a remark of Kenyon, M. R., in Pierson *v.* Garnet[58] is very weighty. He says:[59]

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[54] 5 Myl. & C. 72 (1840).
[55] 3 Bro. Ch., Belt's ed., 95 (1790).
[56] 3 Meriv. 437 (1817).
[57] 3 Ves. & B. 198 (1814).
[58] 2 Bro. Ch. 38, 45 (1786).
[59] At p. 45.

"It would be a lamentable case, if this court were to raise a distinction upon slight words, such as *peto, rogo, fidei tuæ commendo,* and such expressions of the civil law; and if the decisions were to turn upon such grounds, property would be very vague."

(6) In *In re* Caplin's Will [60] a testator, after giving his wife a life interest in a trust estate, directed that on her death a part of the estate should be paid to such of the relations and friends of the wife as she should by will appoint. It was held by Kindersley, V. C., that if no appointment was made, there was a gift over to the objects of the power. Romer, J., sustains this case on the same ground upon which he puts the other cases, that it was "a gift to a class or such of a class as might be selected by the donee." He admits that there was "a general statement" in *In re* Caplin's Will which "went beyond the case." The "general statement" is this:

"There being then a life estate in [the wife] with a power to appoint by will to her relations, and no gift over in default of appointment, I must hold that there is an implied trust in favour of the objects of the power."

(7) In *Re* White's Trusts [61] a testator gave property to trustees in trust for his son R. for life, and then to R.'s children, and then proceeded thus: "Should my said son die childless, I confide in the said trustees for applying" the trust property "to the benefit of such other of my children as they may think fit, for the interest and good of my family." R., the son, died childless, and the trustees died without executing the power. Page Wood, V. C., said: "It is settled by Brown *v.* Higgs and Burrough *v.* Philcox that where there is a power to appoint among certain objects and no gift in default of appointment, the court will imply a gift to the objects of the power equally"; and he accordingly held that the power not having been exercised, the other children took by the implied gift. Romer, J., here again says: "Unless checked by reference to the case before him, that statement was too large."

(8) In Butler *v.* Gray [62] there was, as Romer, J., says, a sufficient indication that the class were to take.

(9) Of *In re* Brierley, [63] a decision of the Court of Appeal, Romer, J., says: "It was a decision not in point on the proposition con-

[60] 2 Dr. & Sm. 527 (1865).
[61] H. R. V. Johns. 656 (1860).
[62] L. R. 5 Ch. 26 (1869).
[63] 43 W. R. 36 (1894).

tended for." But, with submission, it was very much in point, and is dead against the proposition contended for by the learned judge in *In re* Weekes' Settlement. In *In re* Brierley a testator gave his wife the income for life of a fund held in trust, and directed that if he died childless (which happened) the wife might "bequeath or appoint" the fund "to such of my brothers and sisters and nephews and nieces and other of my relatives or next of kin as she shall think proper." It is surely impossible to distinguish the power in this case from that in *In re* Weekes' Settlement. The testator went on to direct that the remainder of his property should be divided into forty-three parts. He disposed of some of these parts, and made his wife residuary legatee. The wife brought a suit in equity calling on the trustees to hand over the fund to her on her executing a release.

There were three possible views: *first*, that there was an implied gift of the fund to the objects of the power; *second*, that the fund passed under the gift of the remainder of the property; *third*, that it passed to the wife as residuary devisee. The Court of Appeal, Lord Herschell, C., Lindley and Davey, L.JJ. (certainly a very strong court), expressly declined to consider whether the second or third view was correct, and they declined *because* the first view was correct. The Lord Chancellor speaks rather contemptuously of the attempt to found any argument on the presence or absence of the words "it is my will" or "desire."

"The truth is that there is no magic about the use of the words 'it is my will and desire.' Everything that is found in the testator's will indicating what is his intention is as much indicating his will and desire as if he had in so many words used that language."

Davey, L. J., in the course of the argument said:

"Would it not be a correct statement of the law to say that if there be a power to appoint among certain objects, but no gift to those objects and no gift in default of appointment, then the law will imply a gift to those objects in default of appointment?"

In Carberry *v.* M'Carthy[64] there was a devise to A. upon trust to receive the rents during her life, with full power to dispose thereof by deed or will to all or any of the testator's children. Chatterton, V. C., passing upon the provision, said:

[64] 7 L. R. Ir. 328 (1881).

"If the question depended solely on the effect of the portion of the will which I have mentioned, I should hold that the power was coupled with a trust, and that the testator's children, being the objects of the power, were intended to take in default of the execution of the power, and were not to be deprived of the benefits intended for them by the failure of the donee to appoint in pursuance of it. They would in such case take the property in equal shares by implication."

The Vice-Chancellor, however, thought that other language in the will excluded the implication.[65]

In *In re* Hall[66] the sum of 500*l.* was by will given in trust, to pay the income to R. for life or until she married, when the testatrix directed the sum to be settled, and she declared that it was her will and desire that if R. died unmarried, she should have power to demise (*sic*) the legacy to such of her brothers or sisters or their children as she should think proper. R. died without effectually exercising the power. Porter, M. R., held that there was no implied gift to the objects of the power. The decision in this case goes further than in *In re* Weekes' Settlement, for in this case the words "will and desire" are used, the presence of which Romer, J., seems to have thought sufficient to give a gift over. The opinion in *In re* Hall gives many extracts from earlier cases, but it seems to contain nothing that calls for remark. It is submitted that it is wrong.

In view of the above, and especially of the direct decision of the Court of Appeal in *In re* Brierley, it is submitted that the conclusion reached in *In re* Weekes' Settlement and in *In re* Hall cannot be sustained, but that, on the contrary, in accordance with the frequent statements of judges and the unanimous opinions of the text writers, gifts in default of appointment to the objects of a power can be raised by implication.

The American cases lend no countenance to the novel doctrine of *In re* Weekes' Settlement.

In Dominick *v.* Sayre[67] there was a devise to M. for life "with power to give the same to descendants." It was held that a gift in default of appointment was implied. The court consider and reject any distinction between a power to A. to appoint to a class and a gift to such members of a class as A. may select.[68]

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[65] See the case stated p. 10, *ante*.

[66] [1899] 1 I. R. 308.

[67] 3 Sandf. (N. Y.) 555 (1850).

[68] See Smith *v.* Floyd, 140 N. Y. 337 (1893).

In McGaughey's Admr. *v.* Henry[69] a tenant for life had a power to divide property as she might think right among her children. A gift to the children was implied.

In Milhollen's Admr. *v.* Rice[70] a testator directed that property in which A. had a life interest should be "at her disposal to whom she thinks proper of her heirs." It was held that there was a gift by implication to A.'s heirs.

In Rogers *v.* Rogers[71] A. who had a life interest, was given "the privilege" of giving the property to whom she pleased among his children or grandchildren. It was held that there was an implied gift to the objects of the power.

In Morris *v.* Owen[72] slaves were bequeathed to S. for life, "and then to be divided at her discretion, amongst my children." The Court of Appeals of Virginia in a *per curiam* opinion, besides disposing of other points, said that the slaves as to whom there was not any appointment "remained as part of the residuary estate." There does not seem to have been any discussion on the point. On the words of this will, it is clear that even Romer, J., and Porter, M. R., would have held there was a gift to the objects of the power. The case would seem to be of little, if any, authority.

Frazier *v.* Frazier's Executors[73] is obscurely reported. The point in question here does not seem to have been considered.

In Holt *v.* Hogan[74] property was given to the testator's wife for life, with the privilege of disposing of the same by will or otherwise amongst "our children" at her death. Whether there was any gift over by implication was a matter not considered; it seems to have been taken for granted that there was not. The question discussed was whether the property fell into the residue or whether there was an intestacy with regard to it.

X. To what objects of a power is a gift implied?

The cases fall under three heads:

(A) Power to appoint to one or more defined classes of relations, such as children, grandchildren, issue, descendants, nephews, etc.

(B) Power to appoint to "family" or to "relations."

(C) Power to appoint to charities.

(A) Under a power to appoint to the members of one or more

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[69] 15 B. Mon. (Ky.) 383 (1854).
[70] 13 W. Va. 510, 543–565 (1878).
[71] 2 Head (Tenn.) 660 (1859).
[72] 2 Call (Va.) 520 (1801).
[73] 2 Leigh (Va.) 642 (1831).
[74] 5 Jones Eq. (N. C.) 82 (1859).

classes, *e. g.*, a power to appoint to children or grandchildren, or a power to appoint to descendants, all the persons to whom an appointment could have been made take *per capita* as tenants in common.[75]

In Jones *v.* Torin,[76] where the power was to appoint to children or their descendants, "descendants" was held to be substitutionary, and in Tucker *v.* Billing,[77] where the power was to appoint to brothers and sisters and their descendants, the same was held. Both of these decisions are questioned by Mr. Jarman.[78] But in Rogers *v.* Rogers,[79] where there was a power to appoint to children or grandchildren, it was held that the children of living children could not share an implied gift. These cases seem very doubtful.

In Martin *v.* Swannell[80] a testator gave his estate to his wife for life, and on her death he devised it to his three children and their issue, as the wife should appoint. The power was not exercised. Lord Langdale, M. R., held that the children took estates tail.

When there is a bequest to children as A. shall appoint, and there is no appointment and only one child, the child takes the whole.[81]

In Eddowes *v.* Eddowes[82] a share of the residue was given to trustees, upon trust, at their discretion, to apply the whole or part of the capital or income for the benefit of the testator's son J., or, at the option of the trustees, to augment the other shares. J. died, and the trustees refused to exercise the option. Kindersley, V. C., held that the share was undisposed of. He said four implied gifts had been suggested: (1) To the other children of the testator (to whom the other shares of the residue were given) excluding J.;

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[75] Brown *v.* Higgs, 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803); Longmore *v.* Broom, 7 Ves. 125 (1802); Brown *v.* Pocock, 6 Sim. 257 (1833); Grieveson *v.* Kirsopp, 2 Keen 653 (1838); Burrough *v.* Philcox, 5 Myl. & C. 72 (1840); Penny *v.* Turner, 15 Sim. 368 (1846), 2 Phil. 493; *Re* White's Trusts, H. R. V. Johns. 656 (1860); Stolworthy *v.* Sancroft, 33 L. J. Ch. 708 (1864); Dominick *v.* Sayre, 3 Sandf. (N. Y.) 555 (1850). *Cf.* Tomlinson *v.* Nickell, 24 W. Va. 148 (1884).

[76] 6 Sim. 255 (1833).

[77] 2 Jur. N. S. 483 (1856).

[78] 1 Jarman, Wills, 3 ed., 482, n. 1, 483, n. *t*. *Cf.*, however, Crozier *v.* Crozier, 3 Dr. & War. 373, 386 (1843).

[79] 2 Head (Tenn.) 660 (1859).

[80] 2 Beav. 249 (1840).

[81] Bellasis *v.* Uthwatt, 1 Atk. 426 (1737); Davy *v.* Hooper, 2 Vern. 665 (1710); Madoc *v.* Jackson, 2 Bro. Ch. 588 (1789).

[82] 7 Jur. N. S. 354 (1861).

(2) to J., excluding the other children; (3) to all the children, including J., equally; (4) half to J. and half to the other children; and he concluded that there was not enough in the will to enable him to determine the persons to whom the testator wished the share to go.

If a power given to a life tenant is exercisable by either deed or will, all those of the class to whom an appointment might have been made are included in the implied gift in default of appointment, and therefore if one of them dies in the lifetime of the donee, his heirs or representatives share in the gift.[83]

In Winn *v.* Fenwick[84] property was settled in trust for A. for life, and after his death, if B., A.'s wife, died in A.'s lifetime leaving any child living at her death, then on trust for all the children of A. and B., in such shares as B. should by deed or will appoint. B. died in A.'s lifetime leaving children and not having executed the power. It was held that the implied gift was only to those children who survived B.

In Stolworthy *v.* Sancroft[85] property was given to trustees upon trust to pay the income to A. for life, and, after her death, if she left issue, to dispose of the property in such manner amongst such issue as A. should by deed or will appoint. A. did not exercise the power. Kindersley, V. C., held that there was a gift implied to the issue of A. living at her death.

Where there is no life estate, and the power is given to executors or trustees, the gift implied in default of appointment is to those objects of the power who are living at the time of the creation of the power.[86]

If the power is exercisable by will only, then as the only objects of the power are persons living at the death of the donee, the gift implied in default of appointment is confined to such persons.[87]

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[83] Madoc *v.* Jackson, 2 Bro. Ch. 588 (1789) (disapproving Maddison *v.* Andrew, 1 Ves. Sr. 58, 60, which is *contra*); Casterton *v.* Sutherland, 9 Ves. 445 (1804); Faulkner *v.* Wynford, 15 L. J. N. S. 8 (1845); *In re* Jackson's Will, 13 Ch. D. 189 (1879); Wilson *v.* Duguid, 24 Ch. D. 244 (1883). *Contra*, wrongly, Rogers *v.* Rogers, 2 Head (Tenn.) 660 (1859). *Cf.* Reade *v.* Reade, 5 Ves. 744, 748 (1800).

[84] 11 Beav. 438 (1849).

[85] 33 L. J. Ch. 708 (1864).

[86] Longmore *v.* Broom, 7 Ves. 125 (1802); Cole *v.* Wade, 16 Ves. 27 (1807); Walter *v.* Maunde, 19 Ves. 424 (1810). See Sugden, Powers, 8 ed., 601, 622; Farwell, Powers, 2 ed., 476.

[87] Kennedy *v.* Kingston, 2 Jac. & W. 431 (1821); Walsh *v.* Wallinger, 2 Russ. & M.

There is one, and only one, case which holds that where a power given to a life tenant is testamentary, the representatives of an object of the power who died in the lifetime of the donee can take. This is a decision of Vice-Chancellor Kindersley in Lambert *v.* Thwaites.[88] The case is referred to as law in the modern text books.[89]

The decision in Lambert *v.* Thwaites is rested on a distinction between a power with an implied gift in default of appointment (*e. g.*, a devise to A. for life, with a testamentary power to A. to appoint to his children), and a direct gift to a class, coupled with a power of distribution or selection (*e. g.*, a devise to A. for life and on his death to his children as he may by will appoint). The distinction is a fine one, and it is obvious that the cases may so run into one another as to make it difficult of application.[90]

But, assuming the distinction to be sound, it seems to be of no practical importance except on two points: *First.* It may be said that there is never an implied gift to a class in default of appointment, and that when the members of the class take in default of appointment, they take because there is a direct gift to them. This is what was held in *In re* Weekes' Settlement.[91] I have discussed this case above,[92] and have endeavored to show that the case is contrary to authority and is wrong. *Second.* It may be said that if a testamentary power is given to a life tenant to appoint to a class, only those members of the class who survive the life tenant can take, but that if there is a gift to a class after the death of the life tenant, in such shares as the life tenant may appoint, there is a direct gift to the class, and that in default of appointment the representatives of those members of the class who have died before the life tenant come in for their share. This was the ground of decision in Lambert *v.* Thwaites.

In that case, by a post-nuptial settlement, land was given to

78 (1830); Brown *v.* Pocock, 6 Sim. 257 (1833); Woodcock *v.* Renneck, 4 Beav. 190 (1841), 1 Phil. 72; Freeland *v.* Pearson, L. R. 3 Eq. 658 (1867); Tucker *v.* Billing, 2 Jur. N. S. 483 (1856); *In re* Susanni's Trusts, 20 W. R. 93 (1877); Sinnott *v.* Walsh, 5 L. R. Ir. 27 (1879). See Moore *v.* Ffolliot, 19 L. R. Ir. 499 (1887).

[88] L. R. 2 Eq. 151 (1866).

[89] Farwell, Powers, 2 ed., 472; Leake, Land Law, 391, 392; 1 Jarman, Wills, 6 ed., 651; 2 Jarman, Wills, 6 ed. 1705.

[90] *Cf.* the remark of Kenyon, M. R., in Pierson *v.* Garnet, 2 Bro. Ch. 38, 45, cited p. 16, *ante.*

[91] [1897] 1 Ch. 289.

[92] See pp. 13 *et seq.*

trustees in trust to pay the rents to W. and his wife during their lives, and, on the death of the survivor, to sell and divide the proceeds amongst all the children of W. in such shares and proportion as he should by will appoint. One of the children died in W.'s lifetime. W. died without exercising the power. It was decided that the representatives of the deceased child were entitled to share. The court held that there was not an estate by implication to the children in default of appointment, but an express vested gift to the children, subject to be divested by the exercise of the power.

But assuming that there was here a direct gift to a class, it still remains a question what is the class to whom the direct gift is made. The learned Vice-Chancellor refers to the doctrine, which is now perfectly well settled, notwithstanding some former doubts, that a gift which would otherwise be vested is not made contingent by being preceded by a power, but it by no means follows that a gift otherwise contingent is made vested by being preceded by a power. Suppose a power is given, with an express gift, in default of appointment, to those members of a class who survive the donee of the power. Here the gift is certainly contingent, and the representatives of a deceased member of the class would not share. Now was not this the case in Lambert *v.* Thwaites?

In Woodcock *v.* Renneck[93] a testator gave a fund to trustees in trust to pay the income to J. and his wife during their lives and the life of the survivor, and after their decease, in trust to pay the fund to their children in such shares and proportions as the survivor of J. and his wife should by will appoint. Lord Langdale, M. R., decided that only the children who survived J. and his wife could share. This case is in flat contradiction with Lambert *v.* Thwaites. Vice-Chancellor Kindersley sought to avoid its effect by declaring that what the Master of the Rolls said was only a *dictum* "very unnecessarily" pronounced. But this, it is submitted, is not correct. What Lord Langdale said was not a *dictum*, but a decision on a point at issue.

Only one of the children survived the parents, and the surviving parent made an appointment to this child. The administrator of a child who had died in the lifetime of the parents brought a bill in equity praying for a declaration that he was entitled to share in the fund, and for a decree that the trustees might be directed to

[93] 4 Beav. 190 (1841).

transfer the same to him. He contended that the appointment by the surviving parent was not valid.

Lord Langdale, M. R., did not decide whether the appointment was valid, and he expressed no opinion upon the point, because, even if the appointment was invalid, only the surviving child could take, and the plaintiff, whose claim was as representing a deceased child, could take no share. He therefore dismissed the bill.

Lord Langdale said:

"I think that there is a gift to children of Mr. and Mrs. Christie, subject to a power to be exercised by the surviving parent. But in considering what children of Mr. and Mrs. Christie were objects of the gift, it is necessary to consider the whole sentence in which the gift is expressed, and that sentence comprises the words creating the power; and although a portion of the sentence, if taken by itself, imports a gift to all the children, the generality of the expression may be limited by the other words of the same sentence; and as the power was to be exercised only by the will of the surviving parent, and therefore could only be exercised in favour of those who were living at the death of the surviving parent: — as this is not, in express terms, a gift to all the children in default of appointment, but a gift or trust for children, with words annexed, shewing that the distribution was to be among the children living at the death of the surviving parent: — and, moreover, as the gift is expressed only in the form of a direction to trustees to transfer and pay to children, after the death of the surviving parent; I think that the objects of the power and the objects of the gift are the children living at the death of the surviving parent, and, consequently, that the Plaintiff has no interest in the fund.

"The Plaintiff contended that the words expressing the power ought to have no effect in determining the objects of the gift, but ought to have effect in shewing an intention to sever the shares of the children so as to prevent a joint tenancy, but the words cannot be thus alternately rejected and employed."

The case was brought by appeal before Lord Cottenham, C.[94] The Lord Chancellor appears to have thought that the appointment was valid. He affirmed the judgment of the Master of the Rolls and said:

"It was contended on the part of the Plaintiff that this was a vested interest in all the children living at the death of the testator William

[94] 1 Phil. 72 (1841).

Linton. For it was said that the words of the bequest in favour of the children were, in substance, the same as those which were made use of in the bequest to Joseph Christie and Sarah his wife, who, it was admitted, took a vested life interest under the will. But to support this argument a part only of the words are taken, omitting the subsequent portion of the clause, upon the true construction of the whole of which the question must depend."

It is submitted that the decision of Lord Langdale, M. R., approved by Cottenham, C., is good sense and good law, and should be followed rather than the decision of Vice-Chancellor Kindersley in Lambert *v.* Thwaites. It is certainly difficult, in construing such a provision, to attribute to a testator an intention that those children should take in default of appointment to whom no appointment could be made.

But, further, the doctrine of Lambert *v.* Thwaites, that upon a gift to A. for life, and, on his death, to his children as he shall by will appoint, the children who have died in the lifetime of A. are entitled to share, — that is, that persons can take to whom no appointment could be made, is inconsistent with what has been decided in two cases in which the life tenant and the donee were different persons. There would seem to be no difference whether the power is in gross or is simply collateral.

(1) In Halfhead *v.* Sheppard [95] a testator devised land to his wife C. for life, and directed that, if R. survived C., he should, immediately on her death, divide the land in such manner amongst all the testator's children as they should severally reach twenty-one as R. should think equitable and fair. The testator had three children; two only reached twenty-one, and all died in the lifetime of C. R. survived C., but did not execute the power. It was held that the children did not take.

(2) In *In re* Phene's Trusts [96] a testator gave a fund to his executors in trust for M. for life, and from and immediately after her death, in trust for the benefit of M.'s children, as the executors might think most to their advantage. Some of M.'s children and also the executors died in M.'s lifetime. It was held that only the children who survived M. were entitled.[97]

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[95] 1 E. & E. 918 (1859).

[96] L. R. 5 Eq. 346 (1868).

[97] *Cf.* Wilson *v.* Duguid, 24 Ch. D. 244, 251 (1883); 2 Jarman, Wills, 6 ed., 1706.

In Carthew *v.* Enraght [98] a testator directed that after the death of his wife, his trustees should divide and pay a fund equally between such ten of the children or remoter issue of H. as the trustees should see fit. At the death of the widow, there were only six descendants of H. living. It was held that they were entitled to the whole fund.

(B) Power to appoint to "family" or "relations."

The word "family" has no technical meaning.[99] When a will gives a power to appoint to a "family" or to the members of a "family," the question whether the person or persons to whom a gift is implied in default of appointment are the heirs, the next of kin, or the children, depends upon the words of the will taken in connection with the state of the family.[100] "The cases on 'relations' are very peculiar." [101]

Under a non-exclusive power to appoint to "relations," [102] none

[98] 20 W. R. 743 (1872).

[99] 2 Jarman, Wills, 6 ed., 1582 *et seq.*

[100] See Cruwys *v.* Colman, 9 Ves. 319 (1804); Wright *v.* Atkyns, 17 Ves. 255 (1810), 1 Ves. & B. 313 (1813), 19 Ves. 299 (1814), more fully reported in G. Coop. 111 (1815), 1 Turn. & R. 143 (1833), (the best statement of the case is in Sugden, Law of Property in House of Lords, 376); Sinnott *v.* Walsh, 5 L. R. Ir. 27 (1879).

[101] *Per* Chitty, J., in Wilson *v.* Duguid, 24 Ch. D. 244, 249 (1883).

[102] When the doctrine of non-exclusive powers, namely that under a power to appoint to children a share must be given to each child, had become settled, it soon became obvious that by giving a shilling to a child, the application of the doctrine might be utterly evaded, and therefore the Court of Equity laid down the rule that the share given to any child must not be illusory. The establishment of this rule as to illusory appointments was the necessary corollary of non-exclusive powers. Without it, non-exclusive powers are a laughing-stock and a legal farce.

But the rule as to illusory appointments is unique in the law. Other rules of doubtful character have found defenders or apologists, but no one has had a good word for this. It has been condemned in the most unmeasured terms by judge after judge; by Sir Richard Pepper Arden (afterwards Lord Alvanley), M. R., in Spencer *v.* Spencer, 5 Ves. 362 (1800); Kemp *v.* Kemp, *id.* 849 (1801); by Sir William Grant, M. R., in Butcher *v.* Butcher, 9 Ves. 382 (1804); and by Lord Eldon, C., in Bax *v.* Whitbread, 16 Ves. 15 (1809), and Butcher *v.* Butcher, 1 Ves. & B. 79, 94, 96 (1812).

This state of things was so intolerably inconvenient and mischievous that a statute was passed abolishing the rule as to illusory appointments. The statute did not touch the doctrine of exclusive appointments, but the absurdity of this, after having been pointed out by Sir George Jessel, M. R., in Gainsford *v.* Dunn, L. R. 17 Eq. 405 (1874), was recognized by the legislature, and in 1874 another statute was passed by which every power is made exclusive.

There is very little law in the United States on non-exclusive powers and illusory appointments, but it is submitted that the proper mode of dealing with them is that adopted by the Judicial Committee of the Privy Council in the case of McGibbon *v.* Abbott, 10 A. C. 653 (1885). A resident in Lower Canada, under a power which would

of the statutory next of kin can be excluded from the appointment, and no one who is not of the statutory next of kin can be included.[103] And though, under an exclusive power, an appointment may be made to a relation who is not one of the next of kin,[104] yet even when the power to appoint to relations is exclusive, the gift over in default of appointment is to the statutory next of kin.[105]

But here a question of some difficulty arises.

At what time are the statutory next of kin to be determined?

First. Suppose the donee of the power is also the life tenant. Here the next of kin are to be determined as of the date of the life tenant's death. This is so not only when the power is exclusive, as in Harding *v.* Glyn,[106] but also when it is non-exclusive,[107] and also whether it is exercisable by either deed or will.[108]

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have been held non-exclusive under the English precedents, appointed to some only of the objects. The appointment was held valid. The Court said:

"The Courts in Lower Canada are not bound by the current of decisions in England, as the Judges in England before 1874, and Lord Alvanley in the case of Kemp *v.* Kemp, considered themselves to be bound, in deciding whether a power was exclusive or non-exclusive."

And again:

"It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief, and thus to be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove."

[103] Pope *v.* Whitcomb, 3 Meriv. 689 (1810); *In re* Deakin, [1894] 3 Ch. 565; Lawlor *v.* Henderson, Ir. R. 10 Eq. 150 (1876); *In re* Patterson, [1898] 1 I. R. 324; Varrell *v.* Wendell, 20 N. H. 431 (1846); Sugden, Powers, 8 ed., 657; Farwell, Powers, 2 ed., 504; 1 Jarman, Wills, 6 ed., 823.

[104] Harding *v.* Glyn, 1 Atk. 469 (1739), see 5 Ves. 501 (1800); Grant *v.* Lynam, 4 Russ. 292 (1828); Sugden, Powers, 8 ed., 658; Farwell, Powers, 2 ed., 504; 1 Jarman, Wills, 6 ed., 823.

[105] Doyley *v.* Attorney-General, 4 Vin. Abr. 485, *pl.* 16 (1735); Cole *v.* Wade, 16 Ves. 27 (1806); Salusbury *v.* Denton, 3 Kay & J. 529 (1857); Mahon *v.* Savage, 1 Sch. & Lef. 111 (1803); Sugden, Powers, 8 ed., 659; Farwell, Powers, 2 ed., 506; 2 Jarman, Wills, 6 ed., 1633. See Spring *v.* Byles, 1 T. R. 435–438 n. (1783); Varrell *v.* Wendell, 20 N. H. 431 (1846).

[106] 1 Atk. 469 (1739).

[107] Pope *v.* Whitcomb, 3 Meriv. 689 (1810), correctly stated in Sugden, Powers, 8 ed., 662, 663.

[108] Harding *v.* Glyn, Pope *v.* Whitcomb. See Cruwys *v.* Colman, 9 Ves. 319, 325 (1804); Birch *v.* Wade, 3 Ves. & B. 198 (1814); Finch *v.* Hollingsworth, 21 Beav. 112 (1855); Sugden, Powers, 8 ed., 661–663; Farwell, Powers, 2 ed., 508; 1 Jarman, Wills,

Second. Suppose the donee of the power is not the life tenant.

In Doyley *v.* Attorney-General[109] a testator gave his whole estate to trustees in trust to pay the income to his niece Elizabeth during her life, and on her death he directed the trustees to dispose of his real and personal estate to such of his relations on his mother's side as were most deserving, and in such manner as they saw fit, and for such charitable uses and purposes as they should also think most proper and convenient. The power was not exercised. Jekyll, M. R., said "that as to the personal estate, there should be no representation of those relations who died in the lifetime of Elizabeth; for before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not."

It would rather appear as if Lord St. Leonards thought that the law would be the same in this case as in that where the life tenant was the donee, but it is not clear from his book on Powers,[110] and in the last edition of Jarman on Wills[111] it is said that "whether this principle [that only relations living at the death of the tenant for life can take] applies except where the donee of the power is also tenant for life is not clear."[112]

Where the power is to appoint to a defined class of relations, the implied gift is to that class, as on a power to appoint to relations on the mother's side. Where the gift is to "poor relations," whether the gift is direct or whether it is one which arises by implication in default of appointment, — and there would seem to be no difference between the two cases, — the better opinion appears to be that the word "poor" is not to be rejected, but that the gift is to be confined to those who are poor.[113]

(C) Power to appoint to charities.

Where there is a power to appoint to charities, and no gift over in default of appointment, there is an implied gift to charity which the court will administer in the same way in which it will administer direct gifts to charity.

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6 ed., 653. But *cf.* Wilson *v.* Duguid, 24 Ch. D. 244, 251 (1883); 1 Chance, Powers, 78.

[109] 4 Vin. Abr. 485, *pl.* 16 (1735).

[110] Sugden, 8 ed., 661.

[111] 1 Jarman, Wills, 6 ed., 653.

[112] See also Wilson *v.* Duguid, 24 Ch. D. 244, 251 (1883).

[113] The cases are collected in Gray, Rule against Perpetuities, 2 ed., § 683, n. See also Farwell, Powers, 2 ed., 508; 2 Jarman, Wills, 6 ed., 1634.

In Doyley *v.* Attorney-General,[114] by a devise, the words of which are quoted above, there was a power to appoint to relations and to charitable uses. The power was not exercised. The property was decreed half to the relations and half to charity.

In Salusbury *v.* Denton[115] a testator directed that a fund, in which his wife had a life interest, should be at her disposal by will to apply a part for such charitable endowment for the poor of Ottley as she might prefer, and the remainder to be at her disposal among the testator's relatives as she might direct. He made his wife sole residuary legatee. The wife did not exercise the power. Wood, V. C., held that half of the fund went in charity and the other half to the testator's child, who was his sole next of kin.

XI. Conflict of Laws.

In Little *v.* Neil[116] a marriage contract, said to have been entered into in the Scotch form, provided that the trustees "shall from time to time, as they in the exercise of their discretion shall see cause, apply and expend the whole income and capital of the said trust estate, or such part or parts thereof as they shall think proper to and for the use or benefit of such one or more of the wife and children of J. H. Parks and the issue of such children" as they shall select. But it was declared that any provision for the wife of Parks should be by an annuity dependent on the life of Parks. The trustees declined to exercise the power. The report states that a question was raised as to the disposition of the property. Kindersley, V. C., delivered the following opinion:

"If it had been necessary to construe this settlement, the Court must have satisfied itself as to the law of Scotland, the country in which it was made; but the present question is not one of the construction of the settlement, but how the fund shall be dealt with in the circumstances which have happened and that must be decided according to the practice of this court. The case of Longmore *v.* Broom is in point upon this question, and by that it was decided that upon the death of the trustees who had power to exercise a discretion, the fund must be divided equally between the objects of the power. Here the objects of the power are the wife and children of Mr. Parks. The only difficulty I feel is whether, in giving Mrs. Parks a share in the fund, I ought not to give effect to the direction to the trustees that whatever she takes

[114] 4 Vin. Abr. 485, *pl.* 16 (1735).
[115] 3 Kay & J. 529 (1857).
[116] 31 L. J. Ch. 627 (1862).

is to be an annuity depending on the life of J. H. Parks; but under the present circumstances, the Court is not exercising the discretion of the trustees nor construing the settlement, and therefore I cannot do otherwise than direct the fund to be divided equally between the wife and children."

It seems here that the question was whether, by the settlement, there was an implied gift to the wife and children, and that this was a question of construction. Even if it were held that there was not an implied gift of an equitable interest, but that this was a case of an imperative trust, the question of whether such trust was raised was a question of construction, and therefore the decision that the Scotch law was not applicable seems on this point questionable.

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